Supreme Court, U.S.
FILED
OCT 1
JOSEPH F. SPANIOL, JR
CLERK

NO. 86-313

in the Supreme Court of the United States

October Term, 1986

GRECIA GONZALEZ,

Petitioner,

vs.

PUBLIC HEALTH TRUST, a/k/a
JACKSON MEMORIAL HOSPITAL,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT PUBLIC HEALTH TRUST, a/k/a JACKSON MEMORIAL HOSPITAL

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QUESTION PRESENTED

Whether a district court may admit an EEOC determination in a jury trial of an employment discrimination action if the party opposing admission raises no objection to the document's trustworthiness.

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BRIEF OF RESPONDENT PUBLIC HEALTH TRUST, a/k/a JACKSON MEMORIAL HOSPITAL

STATEMENT OF THE CASE

The Petitioner's statement of the case is generally accurate, but it ignores several facts important to understanding this case. The Respondent offers the following additional facts in an effort to clarify the issues raised by this petition.

The Respondent, Appellee and Defendant below, the Public Health Trust of Dade County, is responsible for the operation and maintenance of the Jackson Memorial Hospital. R.1-26-2. The Hospital operates a Pathology Department which is staffed by several hundred employees, including a large number of technicians and technologists. R.1-42-1; R.2-134, 135. The Petitioner was employed as a Medical Technologist III. R.1-26-2. In 1983, the Hospital created a new position called "Medical Technologist V", which was to be filled by reclassfying one of the existing Medical Technologists IV. R.2-95, R.3-140. As a Medical Technologist III, the Petitioner was not considered eligible for the position. R.1-42-3; R.2-146. After a series of interviews, the Hospital selected Anna Rundell, a Medical Technologist IV, for the new position. The Petitioner filed a charge with the Equal Employment Opportunity Commission challenging Ms. Rundell's promotion.

At trial, the Petitioner alleged that she was more qualified than Ms. Rundell and that the only reason she was rejected for the Medical Technologist V position was her national origin. The district court expressly rejected the Petitioner's allegations in thorough written findings, explaining that she failed to establish even a prima facie case of discrimination because she was not

a Medical Technologist IV and therefore did not meet one of the established requirements for the Medical Technologist V position. R.1-42-7. The court also found that even if the Petitioner had established a prima facie case, it was effectively rebutted by proof that Ms. Rundell was better qualified for the new position because of her significantly longer service to the Hospital, her exemplary work record, and her extensive experience in administration, budget preparation and other duties related to the Medical Technologist V position. R.1-42-8.

In addition to her claim of discrimination in promotion, the Petitioner also alleged that the Hospital retaliated against her. R.1-1. The retaliation charges were investigated by the Equal Employment Opportunity Commission which determined that there was "no reasonable cause" to believe the Petitioner's allegations were true. Although the Petitioner later abandoned her retaliation claims, the charges were included in both her complaint and the parties' pretrial stipulation. R.1-1; R.1-26-5, 10. She gave no indication in her opening statement, during her testimony or in her objections to evidence, that her retaliation claims were being abandoned until after the close of her case. Before the Petitioner announced that she was abandoning these claims, the Hospital introduced into evidence a copy of the EEOC's determination of no reasonable cause. R.2-57. At the time this document was offered, the Petitioner objected on the grounds that it was hearsay and that it was incomplete because it did not include the entire EEOC file. R.2-57. The Petitioner conceded, however, that the "jury is entitled to consider the [EEOC's] determination" and suggested only that the determination should be presented through live

testimony. *Id.* At no time did the Petitioner suggest that the determination was in any sense untrustworthy within the meaning of Fed.R.Evid. 803(8)(C).

After the Petitioner announced that she was abandoning her retaliation claims, she made no effort to have the EEOC determination removed from the jury's consideration. She never moved to have the determination stricken, and she raised no objection when the document was published to the jury, when the court proposed to instruct the jury on how the EEOC determination should be considered, or when the Hospital mentioned the determination during closing argument. R.3-185, 202, 225.

On appeal to the Eleventh Circuit, the Petitioner argued that the district court's conclusion that she was not discriminated against was contrary to the evidence and that the court should not have admitted the EEOC determination concerning retaliation because she abandoned those claims during trial. The appellate court summarily rejected the Petitioner's challenge to the sufficiency of the evidence, concluding that "the record provides ample evidence to support the trial court's findings of fact and conclusions of law that appellant failed to prove her Title VII discrimination case against appellee." The court rejected the Petitioner's contentions concerning the EEOC determination because the only objection she raised at trial, hearsay, was properly overruled. The Petitioner's remaining objections to the use of the document were waived because the Petitioner "failed to ask the court to strike the EEOC letter from the evidence, and raised no objection to the court's charge on how the letter should be considered and reviewed by the jury." Fed.R.Civ.P. 51.

REASONS FOR NOT GRANTING CERTIORARI

The Petitioner has asked the court to accept certiorari to decide whether EEOC determinations should be *per se* admissible in jury trials of employment discrimination actions or should be admitted only within the discretion of the trial court. The Petitioner's characterization of the question presented misconstrues the record below and raises issues that were never considered by the lower courts. Even if the Petitioner had properly raised this contention below, however, it would not have had any effect on the lower court's rulings. Whether the lower courts applied a *per se* rule or a discretionary rule, the EEOC determination was properly admitted in this case because there is nothing in the record to warrant its exclusion.

I.

THE PETITIONER WAIVED THE ISSUE SHE SEEKS TO RAISE IN HER PETITION FOR CERTIORARI BY FAILING TO RAISE THE ISSUE IN EITHER THE TRIAL COURT OR THE APPELLATE COURT.

The Petitioner's suggestion that the lower courts improperly adopted a *per se* rule requiring admission of EEOC determinations misconstrues the procedural posture of this case and the grounds for the lower courts' rulings. The Petitioner never suggested, and the lower courts never considered, the contention Petitioner seeks to raise before this Court that the district court should have exercised its discretion under Fed.R.Evid. 803(8)(C) to exclude the EEOC determination as untrustworthy. The Petitioner's failure to raise this

objection specifically at trial precludes her from raising it in this petition for certiorari.

There are few rules more firmly established than the requirement that objections to the admission of evidence must be specific. As this court explained nearly one hundred yeas ago,

> The rule is universal that, where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done.

Noonan v. Caledonia Mining, Co., 121 U.S. 393, 400, 7 S.Ct. 911, 915, 30 L.Ed. 1061, (1887), *quoted as authoritative in* 3A C. Wright, *Federal Practice* §841 at 284 (2d Ed. 1982). This common law rule has been incorporated into Fed.R.Evid. 103 which requires that objections be timely and state "the specific ground of objection." If an objection is not specifically raised, it may not be considered on appeal except upon proof of plain error.

At trial, the Petitioner objected to admission of the EEOC determination primarily because it was "hearsay." R.2-57. The Petitioner has since conceded that EEOC determinations are generally admissible as

an exception to the hearsay rule. Brief of Appellant at 13 ("It is conceded that existing law supports the admission of EEOC findings such as the letter which was introduced."). The Petitioner also objected to admission of the determination because it was "incomplete" in that it did not include the entire EEOC file. R.2-57. The Petitioner abandoned this contention on appeal to the Eleventh Circuit and now apparently concedes that "it is not error to exclude from evidence the EEOC investigation file . . . ." Petition for Writ of Certiorari at 8.

The only objection Petitioner raised to the admission of the EEOC determination on appeal was that it was irrelevant because she had abandoned her retaliation claims. The Eleventh Cirucit had no difficulty disposing of this issue because it was never brought to the district court's attention and was clearly not plain error. The Petitioner has since abandoned this contention.

It was not until she filed her petition for certiorari that the Petitioner first suggested that the trial court improperly applied a rule of *per se* admissibility and should have instead exercised its discretion under Fed.R.Evid. 803(8)(C) to exclude the EEOC determination as untrustworthy. This court has repeatedly held that it is inappropriate to consider for the first time on certiorari an issue that was not raised in the appellate court. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971). For the first time in nearly three years of litigation, the Petitioner now insists that the trial court should have considered the possibility that

the EEOC determination was untrustworthy. At trial, however, she never even suggested this ground for exclusion. To the contrary, she admitted that the "jury is entitled to consider the determination" and added only that she preferred that it be presented through live testimony. R.2-57. She declined to call the EEOC investigator or to subpoena any EEOC documents in an attempt to demonstrate the determination should be excluded because it was prepared inadequately. In short, she offered the trial court no reason to exercise its discretion under Fed.R.Evid. 803(8)(C) to exclude the document because "the sources of information or other circumstances indicate lack of trustworthiness." On appeal she raised the issue of relevance but never once suggested that the trial court abused its discretion under Rule 803(8)(C). Having failed to raise the issue below, the Petitioner cannot be permitted to raise the question for the first time in this petition for certiorari.

II.

THE ADMISSIBILITY OF THE EEOC DETERMINATION IN THIS CASE DOES NOT TURN UPON WHETHER THE COURT ADOPTS A *PER SE* RULE OF ADMISSION OR PERMITS ADMISSION ONLY IN THE DISCRETION OF THE TRIAL COURT.

The only reason Petitioner has advanced for why the Court should accept certiorari in this case is that she believes there is a split among the circuits over whether EEOC determinations are *per se* admissible or admissible only in the discretion of the trial court. A review of the case law reveals, however, that no court

has actually held that EEOC determinations are *per se* admissible, and the split of authority to which the Petitioner refers is largely academic. More importantly, the Petitioner has offered no basis for concluding that her case would have been decided any differently under either standard.

This Court has already considered the general issue of whether EEOC determinations are admissible in employment discrimination actions. In *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39, 96 S.Ct. 1949, 48 L.Ed. 2d 416 (1976), the Court held that while EEOC determinations are not dispositive in employment discrimination actions, they are admissible under Fed.R.Evid 803(8)(C). *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60, n.21, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (arbitral decisions concerning employment discrimination are admissible evidence and may be given such weight as the trial court deems appropriate).

The lower courts have reached the same conclusion in both jury and non-jury cases. The first court to consider the issue was the Fifth Circuit in *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). In *Smith*, decided before the adoption of the Federal Rules of Evidence, the court concluded that EEOC determinations are admissible under the Federal Business Records Act, 28 U.S.C. §1732, as an exception to the hearsay rule. Contrary to the Petitioner's characterization of the Fifth Circuit's decision, nothing in the opinion suggests that the court was adopting a rule of *per se* admissibility. In fact, the court made it clear that it was approving admission of the EEOC

determination in part because the record revealed "no reason to suspect any lack of trustworthiness." *Id.* at 158.

The Fifth Circuit has since specifically held that EEOC determinations may be excluded if the surrounding circumstances indicate a lack of trustworthiness. In *McClure v. Mexia Independent School Dist.*, 750 F.2d 396 (5th Cir. 1985), the court approved the admission of an EEOC determination, but noted that such documents may be excluded under appropriate circumstances. The court explained that while EEOC determinations are generally admissible, a party opposing admission "may properly contend that the . . . determination is . . . inadmissible upon showing that 'the sources of information or other circumstances indicate a lack of trustworthiness', Rule 803(8)(C)." *Id.* at 400. If the party opposing admission does not so contend, of course, the court may not exclude the evidence on that basis. *Id.*

Despite the Fifth Circuit's statements in *Smith* and *McClure* that EEOC determinations may be excluded in circumstances indicating a lack of trustworthiness, in *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir, 1984), the Eighth Circuit characterized *Smith* as requiring *per se* admission of EEOC determinations in all discrimination cases. The Eighth Circuit ignored the language in *Smith* indicating that trial courts retain discretion to exclude an EEOC determination if the record indicates a lack of trustworthiness, and the court did not have the benefit of the Fifth Circuit's subsequent decision in *McClure* clarifying the *Smith* standard. Based largely on this misreading of Fifth Circuit precedent, the Eighth Circuit

concluded that there was a conflict between those courts that hold EEOC determinations to be *per se* admissible and those that permit admission in the discretion of the trial court. When read properly, the Fifth Circuit rule is essentially the same as the rule applied in every other circuit. Like the Fifth Circuit, every other appellate court that has considered the issue has concluded that EEOC determinations are generally admissible but that they may be excluded in circumstances demonstrating a lack of trustworthiness. *See, e.g., Hilton v. Wyman-Gordon Co.*, 624 F.2d 379 (1st Cir. 1980) (EEOC findings are generally "significant evidence, [but] their probative force in individual cases varies considerably and is left to the determination of the trial court."); *Cox v. Babcock and Wilcox, Co.*, 471 F.2d 13 (4th Cir. 1982) (The admission of EEOC determinations are discretionary with the district court); *Baz v. Walters*, 782 F.2d 701, 705, n.2 (7th Cir. 1986) ("The EEOC's report is admissible unless it can be shown in some way not trustworthy."); *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1069 (9th Cir. 1978) (EEOC determinations are admissible but it remains for the District Court "to determine the degree of weight to be assigned to this evidence."); *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 820-21 (10th Cir. 1981) (Rule 803(8)(C) allows the court to exclude EEOC reports if "the sources of information or other circumstances indicate lack of trustworthiness."); *Moore v. Devine*, 767 F.2d 1541 (11th Cir. 1985) (While EEOC determinations are generally significant, the probative force in an individual case varies considerably and is left to the discretion of the trial court.).

The Seventh Circuit summarized the case law on this subject in *Tulloss v. Near North Montessori School*,

Inc., 776 F.2d 150 (7th Cir. 1985) and concluded that while the courts appear to apply two theoretically different standards, one of *per se* admission and one of discretionary admission, the two standards are functionally similar. *Id.* at 153. Both standards grant substantial discretion to the trial court to determine the probative value of the evidence, and this "fundamental reliance on the discretion of the trial judge in all circuits reduces this 'conflict' to a largely academic issue." *Id.* In the final analysis, all courts follow the mandate of Fed.R.Evid. 803(8)(C) which permits the admission of EEOC determinations but allows for their exclusion if the surrounding circumstances indicate a lack of trustworthiness.

Whatever academic conflict may exist among the circuits, it has no bearing on this case. Under a *per se* standard or a discretionary standard, the EEOC determination in this case was properly admitted. The discretionary standard does not hold that EEOC determinations must be excluded in all cases, only that the trial court has discretion to exclude such evidence if the circumstances indicate a lack of trustworthiness. In this case, the Petitioner not only failed to produce any basis for concluding that the determination was not trustworthy, she actually admitted that "the jury is entitled to consider the determination." R.2-57. Under these circumstances, it may well have been an abuse of discretion for the court to exclude the evidence; it certainly was not an abuse of discretion to admit the evidence.

When read in context, the "conflict" among the circuits over the admissibility of EEOC determinations becomes largely academic. When applied to the facts of this case, the conflict disappears. Accordingly, this is not an appropriate case in which to accept certiorari to resolve whatever conflict may exist.[1]

[1]If any error was committed by admitting the EEOC determination, it was clearly harmless. The evidence was overwhelming that Petitioner was not discriminated against, and the district judge did not even find it necessary to mention the determination in his extensive written findings and conclusions. *Cf. McClure v. Mexia Independent School Dist.*, 750 F.2d 396, 402 (The erroneous admission of an entire EEOC file was "clearly harmless" where the district judge did not mention the contents of the file in his findings and there was substantial admissible evidence to support the jury's defense verdict).

CONCLUSION

For the reasons stated above, the Respondent respectfully urges the court to deny the Petition for Certiorari.

Respectfully submitted,

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